United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1108

To be argued by
ALAN LEVINE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1108

UNITED STATES OF AMERICA,
Appellee,

—v.—

JOHN DWYER,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

John Dwyer appeals from a judgment of conviction in the United States District Court for the Southern District of New York on December 23, 1975 after a seven-day jury trial before the Honorable Kevin T. Duffy, United States District Judge.

Indictment 75 Cr. 311, filed March 25, 1975, charged Dwyer, Stephen J. Smith and John S. Dobranski with five counts of violating the Gun Control statute. Count One charged all defendants with conspiracy; Counts Two and Five charged Stephen J. Smith with the transfer and possession of certain firearms in violation of sections 5811, 5812, 5861(d) and (e) of Title 26, United States Code. Count Three charged all three defendants with the transfer of certain firearms on September 1, 1974 in violation of sections 5811, 5812, 5861(e) of Title 26,

United States Code, and section 2 of Title 18, United States Code. Count Four charged all three defendants with the possession of a firearm in violation of section 5861(d) of Title 26, United States Code, and section 2 of Title 18, United States Code.

Trial commenced on December 15, 1975 and on December 23, 1975 the jury returned a verdict of guilty against Dwyer and Dobranski on Counts One, Three and Four. Smith pleaded guilty prior to trial to Count One and testified for the Government. On February 13, 1976 Judge Duffy sentenced Dwyer to a suspended term of five years' imprisonment to run concurrently and placed him on probation for that time, and Dobranski to a suspended term of four years' imprisonment to run concurrently and placed him on probation for that time.

Statement of Facts

The Government's Case

On July 27, 1974, Special Agent Joseph Kelly, of the Bureau of Alcohol, Tobacco and Firearms ("ATF"), acting in an undercover capacity, was introduced to Stephen J. Smith, of Peekskill, New York, by Peter Costabile, a government informant, for the purpose of purchasing firearms from Smith. (Tr. 87, 229-230).* Later that day Smith sold Kelly a 9 mm. German Luger automatic pistol with attaching artillery shoulder stock (short-barreled rifle), Serial No. 3809 (Count Two). (Tr. 6, 87). In the course of conversation Kelly told Smith that he was interested in purchasing machine guns and Smith indicated he would be in contact with Kelly.

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* "Tr." refers to pages of the trial transcript; "GX" refers to Government Exhibit.

Shortly thereafter Smith spoke by telephone with John Dwyer, a New Jersey gun collector he had met at a gun collectors' show in Columbus, Ohio.* (Tr. 6-7). Since Dwyer had remarked at the gun show that he had machine guns for sale, Smith repeated Kelly's request and Dwyer said that he had two machine guns for sale, a German MP 40 and a Russian PPSh. Dwyer's price was $600 and it was agreed that Smith would receive a $300 finder's fee. Dwyer expressed concern that Smith's friends might be "feds," but Smith assured him otherwise on the basis of his prior sale of the German Lugar automatic pistol. (Tr. 7).

Arrangements were subsequently made between Smith and Kelly to meet Smith's friend, Dwyer, at Smith's apartment at 169 Oakwood Drive, Peekskill, New York on Sunday, September 1, 1974. (Tr. 8, 87-88) The day before the meeting Dwyer called Smith to ask if it was all right for him to bring to Smith's home another gun collector and friend, BSJ, and Smith consented. (Tr. 8).

On September 1, 1974 Kelly and Costabile, the confidential informant, arrived before noon at Smith's apartment in Peekskill, New York. (Tr. 89). Around 12:30 P.M., Dwyer arrived with his friend John Dobranski, and everyone was introduced. (Tr. 8, 89). After general conversation Dwyer and Smith left the room and returned with two machine guns, a German MP 40 and a Russian PPSh. (Tr. 90). In the next several minutes the four people discussed the two guns. Dobranski explained to Kelly the history of the PPSh, how the PPSh opened and shot. (Tr. 11, 97, 234-235). Dobranski told Kelly and Smith that he and Dwyer had "run a few

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* At the gun collectors' show, Dwyer told Smith about another collector friend from New Jersey, "BSJ," which Dwyer said stood for Bull Shit John.

rounds." (Tr. 11). Dwyer gave Kelly and Costabile a list of other machine guns and short-barreled rifles that he (Dwyer) was interested in purchasing or trading. (GX 33; Tr. 97, 235-236). In another side conversation Dobranski told Costabile about his collection of bullets and Costabile replied that he had some bullets at home that were collector's items that he would send to Dobranski. (Tr. 236, 256-257, 278, 284). Finally, Kelly paid Dwyer $900 for the purchase of a 9 mm. German submachine gun, model MP-40, Serial No. 7284, and 7.62 mm. Russian submachine gun, model PPSh, Serial No. 7090 (GX 6 and 7) (Count Three), and shortly thereafter Kelly and Costabile departed. (Tr. 98-99, 235-237). Dwyer then gave Smith his share of $300, and Dwyer and Dobranski departed. (Tr. 12).

Following this sale, Dwyer wrote Smith several letters during the month of September (GX 10, 29, 31, 32)* in which he referred to BSJ as his "partner" (GX 31) and described, *inter alia*, the various firearms he and BSJ had available to sell to Kelly. On or about September 20, 1974 Dwyer told Smith over the telephone that he had a 44 magnum and a Husqvarna with shoulder stock for sale. (Tr. 13).

On September 25, 1974 Smith and Kelly spoke again by telephone and Smith indicated that both he and Dwyer had several pieces to sell. After several additional conversations between Smith and Kelly, and Smith and Dwyer, arrangements were made to meet at Smith's apartment on October 5, 1974. (Tr. 16, 99-100). Once again, Dwyer told Smith that BSJ would drive him up. (Tr. 14).

At approximately 1:00 P.M. on Saturday, October 5, 1974, Kelly and Costabile arrived at Smith's apart-

* The letters sent into the jury room were redacted by the Government to delete ethnic slurs.

ment. (Tr. 16, 100, 238). Smith displayed for them his collection of pistols. (GX 11-27). At approximately 3:00 P.M., Special Agents of the ATF observed Dwyer and Dobranski arrive at and then enter Smith's apartment. (Tr. 196-198). Dwyer carried a green suitcase (GX 34) and a blue flak jacket (GX 35; Tr. 17, 101). Dwyer, followed by Smith, went immediately to the bedroom. Kelly and Costabile exchanged greetings with Dobranski and Dobranski stated that Dwyer had some toys he wanted to sell. (Tr. 102, 238).

Shortly thereafter Kelly, with Dwyer's permission, went into the bedroom and observed a 44 magnum (GX 8) and 9 mm. Husqvarna Vapenfabriks A. B. with attaching shoulder stock (short barreled rifle), Serial No. D 6865 (GX 9) (Count Four). (Tr. 102-104).

On Kelly's instruction Costabile left the apartment to bring several firearms from the car. Following that signal, other agents of the ATF entered the apartment and placed Smith, Dwyer and Dobranski under arrest. (Tr. 110).

The Defendant's Case

In defense of these charges defendant Dwyer purported to assert an insanity defense, to wit, that he had a compulsive obsessive desire to collect firearms and World War II paraphernalia and that as a result of this hobby he sold and possessed the firearms as charged in the indictment.

To establish this defense, a variety of Dwyer's family members, including his father, mother, brother, uncle and cousin, and several acquaintances took the stand and testified about Dwyer's childhood and adulthood obsession with firearms and World War II paraphernalia.

nalia. (Tr. 359-404, 421, 431, 461-464, 481-488). A portion of that collection including posters of the leaders of Axis Powers, helmets, flags, uniforms, books, mannequins, swords, daggers, and boots, was introduced into evidence. (DD 2).*

Additionally, Dr. Robert T. London, a psychiatrist, testified that the defendant was "[s]hy, withdrawn, seclusive and sensitive" (Tr. 441), that he had a schizoid personality (Tr. 444) and an emotional problem (Tr. 445), and that "in his issue of military equipment . . . he would lack sufficient ability to conform his behavior to the law." (Tr. 446). On direct examination he declined to conclude that defendant Dwyer suffered from a mental defect (Tr. 445) and on examination by the Court, Dr. London stated that although Dwyer suffered from a personality disorder it could not properly be characterized as a "disease." (Tr. 456).

The Government's Rebuttal Case

In rebuttal Dr. Stanley Portnow, a forensic psychiatrist, testified that the dfendant Dwyer did not suffer from a mental disease or defect (Tr. 498), that he did not lack any capacity to understand what he was doing (Tr. 506), and that he was able to conform his behavior to the requirements of law. (Tr. 508).

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* "D" refers to Defendant Dwyer's exhibits.

ARGUMENT

POINT I

The Court properly exercised its discretion in denying defendant an opportunity to reopen his case.

Defendant Dwyer's principal claim of error that the Court denied him a fair trial when it denied him an opportunity to reopen his case by precluding the testimony of a second psychiatrist on the issue of the defendant's criminal responsibility is untenable. Similarly untenable and totally unfounded in the record is the defendant's assertion that such testimony was improperly excluded by the Court on the ground that the Court did not believe the proferred testimony of the psychiatrist.* Rather, the

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* Relevant portions of the trial transcript read as follows:

(Jury not present)

Mr. Diamond: I am only surmising that because I don't know, because when I asked the Court yesterday to set forth its reasons why the Court said it would not permit Dr. O'Connell and said it was obvious but I tell your Honor at this point I have no idea what your Honor means by "obvious."

It seems to me, your Honor, that credibility is a subject matter for the jury to determine, whether or not the testimony of Dr. O'Connell had any value, whether he should be believed, and that by excluding his testimony our case received a devastating blow.

The Court: If you want to know what my views are on Dr. O'Connell's credibility, that is not what I based it on, but Dr. O'Connell's credibility is just about zero.

Mr. Diamond: Pardon me, sir?

The Court: Read it back, please.

Mr. Diamond: I have no idea of why your Honor would say that, and I guess just a feeling your Honor might have, but I would appreciate it if your Honor would

[Footnote continued on following page]

Court properly excluded the witness when he was proferred after the Government rested its rebuttal case which consisted solely of testimony of a psychiatrist on the defense of insanity and after that psychiatrist was no longer available.

Having only been advised on December 8, 1975, the date originally scheduled for trial, that the defendant

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set forth on the record the basis for that belief.

The Court: The basis for the belief?

Mr. Diamond: Yes, sir.

The Court: I get paid in non-jury cases to determine credibility. I watched that man testify, I listened to him, and I was shocked that a medical doctor could get to the point where he would do what Dr. O'Connell did.

Mr. Diamond: Your Honor, I didn't have the opportunity—I'm sorry.

The Court: The report which he submitted, the second one, the one yesterday, is not much better than his testimony.

But you're asking about credibility, and I told you.

Mr. Diamond: I appreciate your Honor having been extremely candid throughout the proceedings, and I appreciate that very much.

Nevertheless, your Honor, perhaps just as a Judge and an attorney talking to each other, with my knowledge of the law, which is certainly less than your Honor's I would respectfully and most humbly submit to your Honor that that question of Dr. O'Connell's testimony as to credibility, should have been judged, ought to have been judged by the jury.

So far as I know——

The Court: But that is not why I excluded it. If it was just a question of his credibility, I assure you that the Government could have done a number on him.

Mr. Diamond: Is there another reason why?

The Court: Sure. There are lots of other reasons.

Mr. Diamond: Would your Honor be kind enough to submit them on the record?

The Court: No. I am running a courtroom, not a classroom. (Tr. 710-711, 713).

Dwyer intended to assert the defense of lack of criminal responsibility, the Government requested and received a brief continuance to have the defendant examined by a qualified psychiatrist. The trial commenced on December 15, 1975 and in its case-in-chief the Government proved the essential elements of the crimes charged and had the psychiatrist, Dr. Stanley Portnow, available for rebuttal in the event the defense was properly raised.* On Wednesday afternoon, December 17, 1975, the Government stated that it only had two more short witnesses before it rested. (Tr. 228).

Because of lengthy cross-examination,** The Government did not rest until Thursday morning, December 18,

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* The defendant Dwyer suggests in his Amended Brief at 7 that the Government should have called its psychiatrist in its case-in-chief. Although as a practical matter calling Dr. Portnow in the direct case would not have solved Dwyer's problem since Dr. O'Connell was apparently not advised to be in court on any particular day during the week of trial, the Government is entitled as a matter of law to the presumption that a defendant is sane beyond a reasonable doubt. *United States* v. *Trapnell*, 495 F.2d 22 (2d Cir.), *cert. denied*, 419 U.S. 851 (1974). Not until "some evidence" is established to the contrary by the defendant, need the Government prove sanity beyond a reasonable doubt. *United States* v. *Trapnell, supra*. Moreover, an insanity defense may be established by lay persons, and until the defendant puts in opinion testimony by a psychiatrist, "[t]he Government cannot, for it has nothing to test or rebut." *United States* v. *Baird*, 414 F.2d 700, 712 (2d Cir. 1969).

** At one point during the cross-examination of the same Government witness who testified on December 17, 1975 the Court stated:

> (Jury excused.)
>
> Gentlemen, it appears quite clear to me that there is an obvious attempt by the defense to lengthen this case, which should have been tried in about three hours. It is something which is incredible alone. There is no need for it. You have both indicated what your defense is. Lord knows the irrelevant questions which you have been asking. I have let you get away with that for the last couple of

[Footnote continued on following page]

1975. (Tr. 349). At that time the Government made it clear that its phychiatrist, Dr. Portnow, was leaving the New York area on Friday and would be unavailable to testify after that time. Counsel for the defendant Dwyer indicated that Dr. Robert London,* a psychiatrist, would be available to testify on Friday, December 19, 1975 for the defense. (Tr. 358).

On Friday morning, Dr. Robert London testified on direct examination; the Government asked no questions. At the close of the morning's session the Government advised the Court that Dr. Portnow would be available at 2:00 P.M. (Tr. 475). After one short witness that afternoon on behalf of defendant Dwyer and before Dr. Portnow took the witness stand, counsel for defendant Dwyer announced to the Court for the first time that he intended to call as a witness a second psychiatrist, Dr. James O'Connell, and that he had been unable to reach Dr. O'Connell on that day. (Tr. 489).** Dr. O'Connell was not served with a subpoena to testify at trial. (Tr. 490).

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days. It is a total discourtesy to this Court by both of you. It has finally gotten to me, and if it continues I will take appropriate measures. We will take a ten minute break.

* * * * *

The Court: If this is a deliberate attempt to try and drag this thing out to Christmas Eve, I am going to warn you that the jury will recognize it and I will recognize it. I will tell you if it keeps up, there will be appropriate measures taken. (Tr. 334, 336).

* In fact, Dr. Robert London was not even approached to examine defendant Dwyer until after the adjournment of the trial on December 8, 1975, and only saw the defendant Dwyer on December 15, 1975, the day the trial actually commenced. (Tr. 436).

** On September 11, 1975 Dr. O'Connell examined Dwyer in connection with the defendant's submission to the United States Attorney's office to be considered for a deferred prosecution program. Dr. O'Connell's report was admitted in evidence at the defendant Dwyer's offer (DD-13) and subsequently withdrawn with the Government's consent. That report stated that Dwyer had a schizoid personality and concluded that Dwyer was not suffering from any "abnormal emotional illness."

The following colloquy then ensued between the Court and defendant Dwyer's counsel:

> The Court: What was the first time you contacted him about showing up today? We have been on trial now, remember, five days.
>
> Mr. Diamond: The first time I contacted him, your Honor, was when the first day of the trial started, I told him the government would probably finish its case in one day and he should come in on Tuesday. That was back, I believe——
>
> The Court: I can't blame the government for not finishing in one day. Go ahead.
>
> Mr. Diamond: Yes. When I spoke to him last Wednesday, he told me that because we didn't proceed he had committed himself to testify in other matters, including specific commitments, and many, many things like that, and that I would have to call him day by day to see if he is available. That's what developed, because the matter was put off from the 8th.
>
> The Court: At the same time, Mr. Diamond, you are aware, it has been made known to you at least three times at this point, that the psychiatrist that the government has called was due here at 2 o'clock and will not be available hereafter; is that correct?
>
> Mr. Diamond: Yes, sir. In that event, your Honor, I would agree to have Dr. Portnou [sic] testify subject to my just putting one more witness on the stand, who would be Dr. O'Connell.
>
> The Court: How can Dr. Portnou [sic] give his rebuttal if you don't have a doctor, psychiatrist, here who is willing to testify, and Dr. London I don't think did, that this man is suffering from a mental disease or defect?

* * * * *

The Court: Where do we go from here? You are looking for a continuance which is basically to foreclose the government from calling its psychiatrist and also to put the matter off until Christmas week.

Mr. Diamond: No, sir. What I'm asking——

The Court: I will consider it. You better get on the phone and see if this guy will be here in a half an hour. (Tr. 491-493).

After a brief recess the Court and counsel continued:

(In the absence of the jury.)

The Court. Mr. Diamond?

Mr. Diamond: Your Honor, I called Dr. O'Connell at his office. I asked him if it was possible for him to come in today, and he said he could be here at 10:00 Monday morning, if I personally picked him up, and I said I would if the Court would allow him to testify on Monday. He is my last witness, your Honor.

The Court: You have no other witnesses?

Mr. Diamond: No, sir.

The Court: Mr. Levine, you have a pyschiatrist present?

Mr. Levine: That is correct, your Honor.

The Court: You can bring him on Monday morning. My immediate reaction is that he should not be permitted to testify, but I will think about it over the weekend and I may change my mind. (Tr. 494 A).

Following this discussion Dr. Stanley Portnow testified in rebuttal on behalf of the Government and supported by the factual data derived from his interview with defendant Dwyer, concluded that Dwyer was not suffering from a mental disease or defect and on the dates of the offenses alleged that he understood the wrongfulness of his conduct and could conform that conduct to the requirements of the law.*

On Monday morning, December 22, 1975, defendant Dwyer appeared in court with Dr. James O'Connell. Dr. O'Connell was prepared to testify on the basis of a new report which he wrote on Saturday, December 20, 1975 without the benefit of any additional consultation with defendant Dwyer, but with the benefit of defendant Dwyer's counsel's selective musings on the course of the trial told to Dr. O'Connell on the Friday evening and Saturday preceding his December 22nd appearance. (Tr. 546-548). Dr. O'Connell's second report, which had been prepared over that weekend at the request of Dwyer's counsel, diagnosed a disease ostensibly suffered by the defendant, *i.e.*, "psychasthenia", which Dr. O'Connell had failed to identify in Dwyer during his earlier treatment of him and had failed to specify in his original report. Additionally, the second report incorporated "boiler plate" conclusions for the insanity defense not contained in Dr. O'Connell's original report. (Defendant Dwyer's Appendix 298A). With the Court's permission the government conducted a *voir dire* of the

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* Defendant argues in his Amended Brief at 14 that Dr. O'Connell should have been permitted to testify if for no other reason than that Dr. Portnow had "relied" on a report by Dr. O'Connell in reaching his conclusions. While Dr. Portnow was provided a copy of Dr. O'Connell's first report, it is clear from his testimony that he only "took it into account" and disputed its competency. (Tr. 510-514).

witness out of the jury's presence to determine when the witness was contacted to testify * and what the basis for Dr. O'Connell's new conclusions were. (Tr. 546-559). Following this brief examination, the Government moved to preclude the witness from testifying on the grounds that to permit the testimony was fundamentally unfair to the Government since it was unable to rebut the defendant Dwyer's new claim of a mental disease and since by the defendant's own dilatory and negligent manner Dr. O'Connell was unavailable during the week of trial. (Tr. 560-563). The Court granted the government's application. (Tr. 573).

The law is well settled that the trial judge has broad discretion in permitting or refusing witnesses to testify out of turn, as well as in granting continuances for a similar purpose. *Ungar* v. *Sarafite*, 376 U.S. 575 (1964); *United States* v. *Frattini*, 501 F.2d 1234; (2d Cir. 1974), *United States* v. *Trapnell*, *supra*; *United States* v. *Wyler*, 487 F.2d 170 (2d Cir. 1973). The record is clear that the Court properly exercised its discretion in precluding the defendant Dwyer from call-

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* The relevant portion of the transcript reads as follows:

Q. Please review for the Court what the status was for a potential appearance as a witness prior to your conversation with Mr. Diamond on Friday evening? A. I didn't intend to appear here as a witness. I was only going to give Mr. Diamond a report on the patient's condition.

The Court: You mean to say last week nobody asked you to come as a witness, until Friday?

The Witness: I didn't say anything. I had no contact with the court.

The Court: Mr. Diamond didn't contact you?

The Witness: Mr. Diamond asked me to come another day, but there was some mix up and I didn't know any details when I was supposed to come, or how, or what, and I didn't come.

ing a second psychiatrist after the Government completed its rebuttal case. First, defendant Dwyer failed adequately to account to the Court for its obvious failure to have the second psychiatrist available. In *United States* v. *Aiken*, 373 F.2d 294, 300 (2d Cir. 1967), such a failure on counsel's part was sufficient to justify the court's refusal to reopen the defendant's case even when no prejudice to the Government was claimed or alleged. Second, defendant Dwyer was not prepared to make and did not make any proffer to the Court on Friday, December 19, 1975 as to what Dr. O'Connell's testimony would be. In *United States* v. *Frattini, supra*, this Court also found that failure a sufficient basis for the exercise of the trial court's discretion.*

Finally, to have permitted Dr. O'Connell to testify would have seriously prejudiced the Government. The reasons for denying a party a continuance, which in effect was an opportunity to reopen the case, were never more manifest than in this case. Asserting a defense of lack of criminal responsibility typically results in a "'battle of experts' testifying as to insanity." *United States* v. *Bohle*, 475 F.2d 872, 874 (2d Cir. 1973). As previously noted (page 9 n., *supra*), the Government's expert must await the defendant's expert for without that testimony there is nothing "to test or rebut". *United States* v. *Baird, supra*. Here, Dr. London, on behalf of Dwyer, testified to his opinion of the defendant's schizoid personality and emotional problems, and Dr. Portnow, on behalf of the Government, testified to his opinion of the defendant's schizoid personality disorder and lack of mental disease or defect. To allow the defendant still

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* While the Court in *Frattini* commented that it would have exercised its discretion in a different manner, the adjournment requested to secure a witness was insignificant and no prejudice to the Government was alleged.

another opportunity to put a second psychiatrist on the stand, particularly when that psychiatrist attributes a previously undisclosed disease to the defendant, without giving the Government an opportunity to rebut that expert's conclusion renders the right of rebuttal meaningless. Defendant Dwyer obviously had no intention of calling Dr. O'Connell as a witness after it retained the services of Dr. London, that is, until Dr. London had testified and the limited value of his testimony became obvious to all.

To have permitted Dr. O'Connell to testify in these circumstances,* would have denied the Government, through no fault of its own, its right to a fair trial of the issue. The trial court properly so found (Tr. 573) and, accordingly, clearly did not abuse its discretion in determining to exclude Dr. O'Connell's testimony.

POINT II

Defendant Dobranski's comments on defendant Dwyer's failure to testify did not deny Dwyer a fair trial

Defendant Dwyer's second claim of error is that the comments of defendant Dobranski's counsel in summation on Dwyer's failure to testify denied him a fair trial. In the alternative, defendant Dwyer argues that

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* Even assuming *arguendo* that the court abused its discretion, this may be that rare case where the expected testimony of Dr. O'Connell was so patently a construct of the joint effort of Dwyer's counsel and Dr. O'Connell, and a change from Dr. O'Connell's earlier view, without any reexamination of Dwyer, that that testimony was next to worthless. Accordingly, any supposed error by the trial court is harmless beyond any possible doubt.

the Government had a burden to request a severance once defendant Dwyer's letters to Smith (GX 10, 29, 31, 32) became available. Both arguments must fail. For purposes of clarity, the last will be treated first.

Defendant Dwyer argues that once the Government became aware of the Dwyer letters to Smith, "it set in motion a chain that would inevitably lead to Dobranski calling attention to Dwyer's failure to take the stand. The Government knew this, and did nothing to protect Dwyer's exposure". (Defendant's Brief at 25).* The

* To support this claim defendant Dwyer misstates the record. That record reflects that the Dwyer letters to Smith came into the Government's possession immediately preceding the commencement of the trial on December 15, 1975, and that the Government provided the defendants with copies of those letters on the morning the trial commenced. In addition, th Government had voluntarily provided defense counsel with the "3500" material prior to the date originally scheduled for trial. By letter dated December 15, 1975 the Government wrote:

> Dear Mr. Diamond:
>
> Pursuant to Rule 16 of the Federal Rules of Criminal Procedure, the Government is providing you with copies of letters written by your client, John Dwyer, to Stephen Smith on the following dates:
>
> September 10, 1974
> September 23, 1974
> September 24, 1974
> September 29, 1974
> October 1, 1974
>
> These letters have only recently come into the Government's possession.
>
> In addition, the Government turned over to you a copy of another letter written by your client John J. Dwyer to Stephen Smith on September 6, 1975.
>
> Very truly yours,
> THOMAS J. CAHILL
> *United States Attorney*

[Footnote continued on following page]

claim that once the Government realized the letters' evidentiary value it should have moved for a severance is utterly frivolous.

The law is well-settled that it is a defendant's burden to come forward with facts demonstrating that he is entitled to a severance. *United States* v. *DeSapio*, 435 F.2d 272 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971). No such motion was made by defendant Dwyer either prior to or during trial * and that failure alone

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By:

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cc: Honorable Kevin T. Duffy
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* The transcript of that conference in pertinent part provides:

> The Court: In an off the record conversation it was agreed that I would enter an order today to have the defendant Dwyer examined by a psychiatrist, and we will have a sanity hearing to make sure that he is in fit condition to stand trial.
>
> The hearing will be scheduled immediately before the trial. The trial is presently scheduled to follow the case of United States against Biono.
>
> Is everybody agreed to this?
>
> Mr. Diamond: Yes.
>
> The Court: Counsel, you made a motion for a severance, though, because you wanted to do it today, and I denied your motion. You, of course, object to the entire procedure.
>
> Mr. Levine: Assuming that it is done the proper way, your Honor, the government has no objection.
>
> The Court: All right, fine. Let me release the jury.

[Footnote continued on following page]

precludes review of the instant claim of error on appeal. *United States* v. *Del Purgatorio*, 411 F.2d 84, 87 (2d Cir. 1969). Nevertheless, even if Dwyer had moved for such relief, given his stated defense to the indictment, we can think of no arguable basis for having granted it.*

Turning to Dwyer's more substantial claim, he argues that defendant Dobranski's counsel's comments in summation on his, Dwyer's, failure to take the stand denied him a fair trial. Those comments are set out at length in the margin.**

The reference above to a motion for a severance was made by Dobranski's counsel who was obviously ready for trial and "wanted to do it today."

Moreover, even if defendant Dwyer had made a motion for severance at that conference it could not have been made on the basis of the Dwyer letters to Smith (GX 10, 29, 31 and 32) inasmuch as the Government did not have them in its possession and obviously, had not turned them over to defense counsel. Accordingly, the court's denial of defendant Dobranski's motion for severance on December 9, 1975 could not possibly have been on grounds relating to the letters.

Once again, the burden was on the defendant Dwyer upon receipt of the letters to move for a severance on that ground. *United States* v. *DeSapio, supra.*

* Had defendant Dobranski's urged severance on the ground that he wanted to comment on Dwyer's failure to testify, it too would have failed inasmuch as his defense was neither inconsistent with nor antagonistic to Dwyer's defense. *United States* v. *Marquez*, 449 F.2d 89, 93 (2d Cir. 1971), *aff'g*, 319 F. Supp. 1019 (S.D.N.Y. 1970), *cert. denied*, 405 U.S. 963 (1972).

** [Remarks of counsel for defendant Dobranski]

Now, I couldn't cross-examine Dwyer and say, "Now, Smith says you told him in a phone call that you were going to get BSJ to drive up, and who is BSJ, and is it Dwyer?"

I couldn't do that because Dwyer never got on the

[Footnote continued on following page]

stand. That means as far as my client is concerned it's one hundred per cent hearsay.

What about the other possible sources of this expression BSJ? Well, we've got them in some of these letters here. Just imagine how ridiculous it would be if I put the letters up there on the witness stand and attempted to cross-examine the letters.

And now, Mr. Letter, first of all let me ask you, sir, this what we have interpreted as BSJ, is that really BSJ or is it something else? Is it BSL or GBJ? Correct us, please, to make sure we have read back the letters right.

All right, thank you very much for that, Mr. Letter.

Now, we would like to ask you: Is BSJ the set of initials of a proper name or is it a set of initials standing for a nickname that has some real meaning like Bullshit John, or is it just an ordinary set of initials that don't mean a thing?

And, sir, Mr. Letter, after you have told us this, can you shed any light on whether or not this BSJ is John Dobranski?

Now, if I went through all of that of course it would be absurd because, obviously, we can't get any answers from the letters, and then the other letter where it says that BSJ is a sort of a partner of mine—well, if that was a real person intstead of a letter we would want to ask, "Well, what kind of a partner are you talking about? Are you talking about a sexual partner, are you talking about a financial partner, are you just talking about an expression the way police do? Two policemen ride together in a police car. He's my partner. All they do is do their job together and ride in a car and they are partners.

They don't make any money together—or at least they are not supposed to.

At any rate, the real significance of that expression in the letter, BSJ is my partner, has never been disclosed in this court, and John Dobranski through me as his attorney has had no opportunity to cross examine this statement.

So we have the initials BSJ introduced in the case on the eve of trial when the complaint Smith comes down and produces the letters and then it appears that, well, Dobranski just barely fits in as a possible BSJ by virtue of having one initial match the third letter (Tr. 657-659).

* * * * *

[Footnote continued on following page]

Neither Dwyer nor Dobranski took the witness stand. Succinctly stated, defendant Dobranski's defense was that he was an innocent passenger on Dwyer's illicit trips to Peekskill, New York, and defendant Dwyer's defense was that he lacked criminal responsibility to know and appreciate those acts.

Relying on *DeLuna* v. *United States*, 308 F.2d 140 (5th Cir. 1962), Dwyer argues that it was a denial of his constitutional right to remain silent at trial for the court to permit his co-defendant Dobranski to comment unfavorably on Dwyer's failure to testify and that such comment requires reversal. In *De Luna*, DeLuna and Gomez were tried jointly on a narcotics charge. Gomez took the witness stand and, claiming to be an innocent passenger, placed all the blame on DeLuna. DeLuna did

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Although Dwyer didn't take the stand we have heard a lot about his personality, both from family members and from psychiatrists, including one psychiatrist for the government. And all these witnesses, whether they are family members, lay people, or the doctors, they are all in agreement with the kind of person that Dwyer is—a very shy person, a person with very few social contacts, who doesn't meet people well, or get along with people well; and, according to Costabile, a very leery person, a person who was very concerned about the possibility that there were federal agents going to descend upon them up there in Peekskill.

So with that being the kind of person that Jack Swyer [sic] was, a withdrawn person, a shy person, a person with few outside contacts, with hardly any friends, who was leery of getting himself in trouble, but nevertheless went ahead and dealt with these weapons for the reasons that the doctors have told you about—with all of that in the picture the government wants you to believe that nevertheless Dwyer would have exposed Dobranski to the risk of being criminally prosecuted by saying, "Dobranski, let me tell you this. I am engaged in an illegal activity, transporting illegal guns up there to Peekskill." (Tr. 669-670).

not testify and in summation his counsel argued that he was being made a scapegoat. Counsel for Gomez, in his summation, contrasted Gomez' willingness to testify with DeLuna's unwillingness to take the stand. Judge Wisdom for the Court stated that "to meet the requirements of a fair trial as embodied in the Fifth Amendment, the trial judge must protect an accused's right of silence." 308 F.2d at 154.

Subsequent cases, however, have specifically limited *DeLuna* to the situation where counsel for one defendant comments on the failure of another defendant to testify and where the defendants' defenses are based on mutually exclusive theories of guilt. Only in such a case is a comment by a co-defendant's counsel considered a sufficient trespass on the Fifth Amendment right of silence. Otherwise, those courts have held that in an effort to salvage one's right to confrontation when no such confrontation is possible due to a co-defendant's failure to testify there may be created a *duty* on counsel to comment on such failure to testify. *United States* v. *Nakaladski*, 481 F.2d 289 (5th Cir.), *cert. denied*, 414 U.S. 1064 (1973). *See United States* v. *Lemonakis*, 485 F.2d 941 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 989 (1974); *United States* v. *White*, 482 F.2d 485, 488 (4th Cir. 1973), *cert. denied*, 415 U.S. 949 (1974).* Applying the *DeLuna* standard here, Dwyer's argument must fail. It is plain that defendant Dwyer's defense was not to put the blame on Dobranski, rather it was to concede the facts and claim a lack of criminal responsibility. For Dobranski's part, his theory of the case, which exculpated him, did not tend to negate, but rather to support Dwyer's defense of insanity. Dobranski claimed he was an innocent by-

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* Our research has failed to reveal any cases in this court on this issue. In *United States* v. *Marquez*, *supra*, the Court stated: "it was not necessary to consider the question raised by *DeLuna*," 449 F.2d at 93.

stander and his comments, which Dwyer challenges here, were directed at his, Dobranski's inability to have Dwyer explain what "BSJ" means and confirm Dobranski's innocent participation. Thus, the two defenses were neither antagonistic, nor mutually exclusive.

Furthermore, Dobranski's counsel did not ask the jury in summation to draw an inference adverse to Dwyer from Dwyer's refusal to testify. Rather, his main argument was directed at Dobranski's innocence and the difficulty in proving it. Moreover, in Dobranski's main reference to Dwyer's failure to testify, defendant Dobranski actually made the same argument to the jury concerning Dwyer's mental state as defendant Dwyer did. (Compare Tr. 669-670 with Tr. 618-622, 624-625). Finally, at the end of his summation counsel for Dobranski asked the jury to draw no adverse inference from a defendant's refusal to testify. (Tr. 700-703). Unlike *DeLuna*, it was not essential to Dobranski, or even relevant, to prove Dwyer's guilt. Other courts have declined to follow the rule announced in *DeLuna* where counsel commented favorably on the fact that his client testified and not on the failure of a co-defendant to testify, reasoning that such comments did not give rise to inference adverse to the non-testifying co-defendant. *United States* v. *Hodges*, 502 F.2d 586 (5th Cir. 1974); *Varela Cartagena* v. *United States*, 397 F.2d 278 (1st Cir. 1968). The same conclusion should apply here.

Moreover, application of the *DeLuna* rule in the present context would be, we respectfully submit, particularly unwise. It would permit counsel for two or more co-defendants being jointly tried, in the absence of any error by the court or government counsel, to lay a predicate for a claim of prejudicial error on appeal.

Finally, whatever adverse inference the jury may arguably have drawn from the summation of defendant

Dobranski was cured in the Court's charge to the jury. That charge, set out below,* cautioned the jury against drawing such an inference and constituted an adequate remedy for defendant Dwyer. *See United States* v. *Hines*, 455 F.2d 1317 (D.C. Cir.), *cert. denied*, 406 U.S. 969 (1972) (cautionary instruction sufficient).

POINT III

The mailing of a bullet by the informant to the defendant not appealing his conviction is not sufficient misconduct to dismiss the indictment.

Finally, defendant Dwyer claims the indictment should have been dismissed on the ground of governmental misconduct in that the confidential informant, at the request of defendant Dobranski, sent a 9 mm. bullet to Dobranski in or about September, 1974, in

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* The Court charged:

"Mention was made that a defendant did not testify. Please. There is no reason why you sould speculate as to why. There are many reasons why a person would not want to testify. He may feel, because of the strain of being a witness, the tension, that he may not be calm. He may be embarrassed by his lack of education or his inability to speak well in front of a group of people. You are not to speculate on these things. You are not to draw any inference whatsoever from the defendant's failure to take the stand.

The presumption of innocence to which I referred is removed only if and when you ladies and gentlemen of the jury are satisfied that the Government has sustained its burden of proving the guilt of the defendant beyond a reasonable doubt." (Tr. 758).

violation of Title United Code, Section 1716* a misdemeanor offense, and thereby induced the second meeting between the parties on October 5, 1974. This argument is not only inconsistent with the facts proved at trial, but insufficient as a matter of law.

At first blush, Dwyer's claim falls far wide of the mark inasmuch as the bullet was sent by Costabile to defendant Dobranski, who has not appealed his conviction. Nevertheless, defendant Dwyer's argument is that the transfer of the bullet "induced the second visit" and, thus, "the two visits were more persuasive of a charge of conspiracy." (Defendant's Brief at 27). However, Dwyer was not even present when the arrangements were made for the bullet between Costabile and Dobranski (Tr. 285), and there is no evidence that Dwyer even knew about it. Moreover, at the first meeting on September 1, 1974, defendant Dwyer, clearly anticipating additional transactions, gave Special Agent Kelly and Costabile a list of other machine guns which he (Dwyer) was interested in purchasing. (Tr. 97, 235-236; GX 33). That Dwyer intended to trade with Kelly on future occasions is also manifest by the letters written to Smith during the month of September, 1974. (GX 10, 29, 31, 32). It is clear, consequently, that the mailing of the bullet from Costabile to Dobranski had absolutely nothing to do with Dwyer's presence at and participation in any of the pertinent meetings.

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* Section 1716 provides:

§ 1716. Injurious articles as nonmailable

(a) [A]ll explosives, inflammable materials, infernal machines, and mechanical, chemical, or other devices or compositions which may ignite or explode, which may kill or injure another, or injure the mails or other property, whether or not sealed as first-class matter, are nonmailable matter and shall not be conveyed in the mails or delivered from any post office or station thereof, nor by any officer or employee of the Postal Service.

Similarly, it is clear that since the bullet was mailed only after the first meeting on September 1, 1974, and the consummation of the sale on that date, the jury's verdict of guilty on Count Three premised on that September 1 sale could not in any way be affected. Since the suspended sentence and period of probation imposed by Judge Duffy on each count of which Dwyer was convicted are all to run concurrently, this Court may, in its discretion, decline to review this particular issue raised by Dwyer. *Barnes* v. *United States*, 412 U.S. 837, 848 n. 16 (1973). *United States* v. *Neville*, 516 F.2d 1302, 1307 n.6 (8th Cir. 1975), *cert. denied*, —U.S.— (1976); *United States* v. *Keller*, 512 F.2d 182, 185 n.8 (3d Cir. 1975); *United States* v. *Bath*, 504 F.2d 456, 457 (10th Cir. 1974).

Defendant Dwyer's claim that the mailing of the bullet constituted governmental misconduct sufficient to dismiss the indictment is meritless. Putting the facts of the bullet in perspective, it is plain that the bullet itself was unrelated and collateral to the firearms charged in the indictment. Moreover, Costabile did not send it to Dobranski for use with any of the firearms, nor could the bullet be used with or as a part of any of the firearms. (Tr. 284-285).

In *Hampton* v. *United States*, 44 U.S.L.W. 4542, 4544 (April 27, 1976), Justice Rehnquist, in announcing the judgment of the Court, held that criminal activity by government agents, to wit, providing illicit narcotic drugs for the offense alleged, which constituted the *corpus delicti* of the offense, did not require dismissal of the indictment when the defendant was predisposed to commit the alleged

offense.* Not only was the activity herein not central, or even arguably related, to the offenses charged, but defendant Dwyer was concededly predisposed to commit the offense charged on October 5, 1974, to wit, the possession of a firearm in violation of Title 26, United States Code, Section 5861(d). *A fortiori*, on the basis of *Hampton* no dismissal is mandated here.

As governmental activity, unrelated to the commission of the offense, the act alleged here falls far short of the "governmental involvement" which the Second Circuit found excessive in *United States* v. *Archer*, 486 F.2d 670, 676-677 (2d Cir. 1973), and the "governmental misconduct" which would shock the court's conscience under *Rochin* v. *California*, 342 U.S. 165 (1952). Accordingly, this claim too must be rejected.

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* Mr. Justice Rehnquist was joined in the plurality opinion by Mr. Chief Justice Burger, and Mr. Justice White. In the view of Mr. Justice Powell and Mr. Justice Blackman, concurring with Mr Justice Rehnquist, "[t]he cases, if any, in which proof of predisposition is not dispositive will be rare. Police overinvolvement would have to reach a demonstrable level of outrageousness before it could bar conviction." *Id.* at 4545 n. 7. Accordingly, five members of the current Court would sustain a conviction where the defendant was predisposed to commit the crime, as here, and the extent of government involvement was as limited as shown by the evidence here.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,
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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ALAN LEVINE being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 27th day of May, 1976, he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Milton Diamond
The Gate House
River Road
Highland Park, NJ

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Alan Levine

Sworn to before me this
27th day of May, 1976

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1977